UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

UNITED STATES OF AMERICA PLAINTIFF

vs. CRIMINAL ACTION NO. 3:09-CR-85-S
***- Electronically Filed -***

KAREN CUNAGIN SYPHER DEFENDANT

**UNITED STATE'S REPLY TO SYPHER'S RESPONSE TO MOTION FOR PSYCHOLOGICAL EXAMINATION**

In her Response to the United State's Motion for a competency examination, the defendant raises three objections:

(1) she objects to any pretrial commitment for an examination;

(2) she objects to the sufficiency of the grounds proffered for the examination; and

(3) she objects that there is no legal authority for the Court to order a competency examination.

Response, p 5. These objections will be answered in turn.

(1) Pretrial Commitment. The United States has moved for the competency evaluation pursuant to 18 U.S.C. § 4241. Section 4241 states that any related psychiatric or psychological evaluation and report are to comply with the provisions of 18 U.S.C. § 4247(b) and (c). Section 4247(b) describes the parameters for evaluations. This section permits the Court to commit a defendant to the custody of the Attorney General for a reasonable period, but not to exceed thirty days.

The United States has expressed no opinion as to whether commitment is necessary, appropriate or reasonable. Until such time as the Court may order an evaluation or solicit positions of the parties on this issue, the United States expresses no opinion or position on whether commitment is necessary or appropriate. The United States does endorse the least restrictive procedure that is still compatible with the purposes and objectives of any evaluation.

(2) Reasonable Cause for the Examinination. 18 U.S.C. § 4241(a) provides that a competency hearing is to be conducted "if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense." If the Court finds that a hearing is appropriate, the Court may order that a psychiatric or psychological examination of the defendant be conducted prior to the hearing. 18 U.S.C. § 4241(b).

As to the type of behavior that should trigger a competency hearing, the Supreme Court has said,

> evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but . . . even one of these factors standing alone may, in some circumstances, be sufficient." There are, of course, no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated. That they are difficult to evaluate is suggested by the varying opinions trained psychiatrists can entertain on the same facts.

*Drope v. Missouri*, 420 U.S. 162, 180 (1975). The initial inquiry is not whether the irrational behavior of a defendant is sufficient to establish incompetence, but whether the irrational behavior is sufficiently irregular to require further inquiry.

The defendant claims that a competency examination can be ordered only if there is "'reasonable cause to believe' the defendant *was* incompetent." Response, p 5 (emphasis added). This rewriting of the statute mis-states the legal standard. The statute requires a hearing if there is reasonable cause to believe "may presently be" incompetent. The need for a hearing is not triggered by a showing that the defendant *is* incompetent (or "was incompetent," as the Response states, compounding its error with the past tense), but upon a showing that the defendant "*may*" be incompetent -- at the present time. 18 U.S.C. § 4241(a).

The specific factual grounds supporting the United States' contention that the defendant may be incompetent are outlined in the sealed supplemental filing that accompanied the United States' Motion. Those facts are proffered to the Court as provable at any evidentiary hearing. In her Response, the defendant attacks the sufficiency of these facts. But she disputes only the conclusions and inferences drawn from those facts. She does not dispute the facts themselves.

In opposing the Motion, the defendant's counsel at least impliedly endorses a finding that the defendant is competent to stand trial. The United States submits that the opinion of this experienced criminal attorney itself merits consideration in evaluating the need for an examination and hearing. He is in a position to see and assess whether this defendant can assist him properly in her defense. But his opinion should be weighed against that of previous counsel, also experienced, who appeared to hold a different opinion. On many occasions previous defense counsel expressed concerns to the undersigned AUSA about the defendant's mental status; he

sent her to one psychiatric examiner for an evaluation; and then he asked that the United States seek a court-ordered competency evaluation of the defendant even after the private evaluation had been completed.

As the United States brought to the Court's attention in its original filings (in the sealed supplemental filing), a psychiatrist hired by the defendant has already examined the defendant, and issued what was described by former defense counsel as a preliminary report. In making a pronouncement of competency with no related analysis, that report failed to meet the requirements of 18 U.S.C. § 4247(c). For multiple additional reasons set forth in the sealed Supplement to the United States' Motion for Psychological Examination, that report -- unfortunately -- must be deemed unreliable and facially insufficient. Because that report has little value, the United States contends that an independent evaluation should be conducted. It is not unusual for multiple evaluations to be conducted of defendants over competency issues. In fact, multiple evaluations were conducted for a single defendant in cases cited by the defendant in her Response. See *United States v. Collins*, 949 F. 2d 921 (7th Cir. 1991) (five evaluations performed); *Newfield v. United States*, 565 F.2d 203 (2d Cir. 1977) (two evaluations).

(3) Legal Authority for Competency Examination. In her Response, the defendant appears to argue that the Court has no authority to order a psychiatric or psychological examination to determine her competency because she has not given notice of intent to present any evidence of any mental condition. Response, pp 7 - 10. This rather convoluted and confused argument is plainly wrong. Section 4241 and Fed.R.Crim.P. 12.2 both authorize an order for a competency examination independently of orders for any other examination for any other purpose.

The statutory scheme and rules permit psychological or psychiatric examinations for a number of separate, independent reasons and for varying purposes, as outlined in 18 U.S.C. §§ 4241, 4242, 4243, 4244, 4245, 4246, and 4248. Each of these Sections authorizes a separate order for a separate examination pursuant to Section 4247(b). Section 4247(b) describes the requirements for the examinations.

Criminal Rule 12.2(c)(1), entitled "Authority to Order an Examination; Procedures," authorizes the Court to order examinations under three circumstances:

* "a competency examination under 18 U.S.C. § 4241"; Rule 12.2(c)(1)(A);

* an examination under 18 U.S.C. § 4242 if the defendant gives notice of an insanity defense; Rule 12.2(c)(1)(B); and

* an examination if the defendant gives notice of an intention to introduce expert evidence relating to a mental condition of the defendant; Rule 12.2(c)(1)(B).

Orders for examinations for each of these circumstances are separately authorized, and one type of order or examination is not dependent upon the existence of circumstances justifying another.

The United States does agree with the statement in the Response that the defendant has not provided any notice that she intends to introduce expert testimony concerning any mental condition at the time of the offenses charged. But any such notice or its absence is irrelevant to whether a court has the authority to order a competency evaluation.

The defendant's argument that the Court has no authority to order an examination is misplaced. The defendant's right to due process requires the Court to evaluate competency if there is reasonable cause to believe the defendant may be incompetent. In making this evaluation, the Court is clearly authorized to order a psychological or psychiatric examination.

## CONCLUSION

In sum, the United States does not assert that the defendant is "suffering from a mental disease or defect rendering [her] mentally incompetent ." Instead, the United States asserts only that there is reasonable cause to believe that she *may* be incompetent. The attorneys and agents representing the United States are not trained to make a determinations of competency. But they are obliged to bring persistent irrational behavior to the attention of the Court so that the Court can make a judgment about her mental state and also order an evaluation by trained professionals, if appropriate. The United States asks only that a qualified professional evaluate the defendant consistent with 18 U.S.C. § 4247.

Respectfully submitted,

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s/ *John E. Kuhn, Jr.*

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CERTIFICATE OF SERVICE

I hereby certify that on September 22, 2009, I electronically filed the foregoing Motion and accompanying Order with the clerk of the court by using the CM/ECF system, which will send a notice of electronic filing to the counsel for the defendant, James A. Earhart.

s/ *John E. Kuhn, Jr.*
John E. Kuhn, Jr.
Assistant United States Attorney